

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
CONSUMER BANKERS ASSOCIATION)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling with Respect)	
to Certain Provisions of the Wisconsin)	
Statutes and Wisconsin Administrative Code)	

**OPPOSITION OF CONSUMER BANKERS ASSOCIATION TO MOTION OF
STATE OF WISCONSIN TO DISMISS PETITION**

The Consumer Bankers Association (“CBA”), by its attorneys and on behalf of its members, pursuant to sections 1.4 and 1.45(b) of the Commission’s rules, hereby responds in opposition to The State of Wisconsin’s Motion to Dismiss the Consumer Bankers Association’s Petition on grounds of Sovereign Immunity (“Motion to Dismiss” or “Motion”).¹

As the Commission pointed out in its *Report and Order* of July 3, 2003, the Telephone Consumer Protection Act (“TCPA”) reflects Congress’s “clear intent . . . to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations.”² Consistent with that intent, the Commission has adopted implementing regulations that balance the legitimate interests of both businesses and consumers, and has

¹ Motion by the State of Wisconsin Pursuant to 47 C.F.R. § 1.41 to Dismiss Petition of the Consumer Bankers Association on Grounds of Sovereign Immunity, CG Docket No. 02-278 (Feb. 1, 2005). All filings submitted in Docket No. 02-278 will hereinafter be short cited.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14064 (2003) (“*Report and Order*”).

announced its intention to preserve that balance by preempting more restrictive state regulation of interstate telemarketing.³

The CBA's present Petition is brought in response to the Commission's express invitation to "seek a declaratory ruling from the Commission" in the event that "a state law is inconsistent with section 227 or [the Commission's] rule"⁴ The CBA has filed two such petitions, requesting preemption of the Indiana and Wisconsin telemarketing statutes to the extent those statutes fail to recognize the "established business relationship" provisions of the Commission's rules when applied to interstate calls.⁵ As the CBA petitions point out, enforcement of the Indiana and Wisconsin restrictions would subject the CBA members to "multiple, conflicting regulations" in derogation of congressional intent.⁶

With its present Motion, Wisconsin joins New Jersey, North Dakota, Indiana and Florida in raising the novel claim that this Commission is prevented from exercising its jurisdiction over interstate telecommunications by the doctrine of sovereign immunity.⁷ Acceptance of this argument by the Commission would overturn decades of settled law and deprive the Commission of its ability to carry out its congressional mandate to regulate "all interstate and foreign

³ *Id.* ("We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.")

⁴ *Id.*

⁵ Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code (Nov. 19, 2004); Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code (Nov. 19, 2004).

⁶ *Report and Order*, 18 FCC Rcd at 14064.

⁷ North Dakota's 47 C.F.R. § 1.41 Motion to Dismiss (Nov. 8, 2004); New Jersey Attorney General Reply Comments (Dec. 2, 2004); State of Indiana's Motion to Dismiss (Jan. 24, 2004); State of Florida's Motion to Dismiss (undated, electronically filed on Jan. 12, 2005).

communication by wire or radio”⁸ Fortunately, the applicable law neither requires nor permits this result.

Of the authorities cited in Wisconsin’s Motion, the only decision that even involves an administrative proceeding is that of the United States Supreme Court in *Federal Maritime Commission v. South Carolina Ports Authority* (“FMC”).⁹ In *FMC*, the Court was required to decide whether a Federal Maritime Commission proceeding impermissibly placed the State of North Carolina in the position of an involuntary defendant in a private lawsuit.¹⁰ The Court found that the Commission’s proceeding *was* adjudicatory, but on the specific grounds that the proceeding was adversarial, was heard by an Administrative Law Judge, and was governed by rules of procedure and evidence effectively equivalent to those used in federal civil litigation.¹¹

None of these factors is present in this declaratory ruling proceeding. In fact, as other participants in this docket have pointed out, the better comparison is to the preemption decision reviewed by the Sixth Circuit Court of Appeals in *Tennessee v. United States Department of Transportation* (“*Tennessee v. DOT*”), which found that an agency’s consideration of a preemption request is not an adjudication and is not controlled by the rationale of *FMC*.¹² As the court in that case pointed out, describing a Department of Transportation preemption process that is identical in relevant respects to this Commission’s preemption procedure:

⁸ 47 U.S.C. § 152(a).

⁹ 535 U.S. 743 (2002).

¹⁰ “States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government Nevertheless, the [Constitutional] Convention did not disturb States’ immunity from private suits, thus firmly enshrining this principle in our constitutional framework.” *Id.* at 752.

¹¹ *Id.* at 758.

¹² 326 F.3d 729 (6th Cir. 2002), *cert. denied*, 540 U.S. 981 (2003).

Rather than an adjudication of the rights and responsibilities of different parties leading to injunctive relief and an award of monetary damages, the preemption decision in 49 U.S.C. § 5125 does not direct the entry of relief against the State of Tennessee. Instead, it serves as an administrative interpretation of a federal statute The action of the Associate Administrator does not result in an order of enforcement against a state, nor does it leave a state defenseless in later litigation if the state chooses not to participate in the administrative proceeding Further, in contrast to the powers of the Federal Maritime Commission under provisions of the Shipping Act, . . . the USDOT Administrator does not possess the power to assess a civil penalty for non-compliance because the agency is without authority to issue an order against the state. Instead, the Administrator is merely providing an agency interpretation of the federal law in question

[T]he administrative procedure addressed in this matter falls within the rulemaking process lying at the center of the responsibilities of federal executive agencies. Rather than an adjudicative procedure, the process utilized to reach a preemption determination serves the valuable function of allowing an agency of the executive branch to interpret federal legislation that it is authorized to enforce. This procedure, employing a notice-and-comment process and the expertise of the USDOT, does not offend the dignity of the states, nor does it force a state to adjudicate claims brought by private citizens against the state as if it were sued in an Article III tribunal. We hold that it is, instead, an appropriate -- and constitutionally valid -- method designed to permit enforcement of federal legislation implementing the Commerce Clause of the United States Constitution.¹³

Like the agency decision at issue in *Tennessee v. DOT*, grant of the relief requested in the CBA's petition, pursuant to this Commission's notice-and-comment process, will serve "the valuable function of allowing an agency of the executive branch to interpret federal legislation that it is authorized to enforce," without forcing the State of Wisconsin "to adjudicate claims . . . as if it were sued in an Article III tribunal."¹⁴ Accordingly, there is no basis for dismissal of the

¹³ *Id.* at 736. See FreeEats.com d/b/a ccAdvertising's Opposition to Motion to Dismiss (Nov. 18, 2004); American Teleservices Association Reply Comments (Dec. 2, 2004).

¹⁴ *Tennessee v. DOT*, *supra*, 326 F.3d at 736. In fact, the declaratory ruling procedure under which the CBA requests preemption of certain provisions of the Wisconsin telemarketing statute has been applied by this Commission in a number of cases, and the State of Wisconsin cites no occasion on which that procedure has been challenged, much less rejected, on sovereign immunity grounds. See, e.g., *Vonage Holdings Corp. Petition*

CBA's petition on grounds of sovereign immunity, and the State of Wisconsin's Motion should be denied.

CONCLUSION

In July of 2003, this Commission correctly interpreted the intent of Congress when it declared that state regulation of interstate telemarketing must be preempted when more restrictive than federal law, and urged the states to avoid inconsistent and burdensome requirements that would cause needless confusion to businesses and consumers. Unfortunately, Wisconsin and other states that are the subjects of pending preemption petitions have declared their intention to resist this Commission's lawful assertion of jurisdiction. In light of this consistent pattern of non-compliance, the Commission is well advised simply to declare its plenary jurisdiction over interstate telemarketing.¹⁵ In the alternative, the Commission should grant the pending preemption petitions without additional delay, and should reject the motions of Wisconsin and

for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 FCC Rcd 22404 (2004).

¹⁵ See, e.g., MBNA America Comments at 6-12 (Nov. 17, 2004).

other states to avoid the Commission's jurisdiction on the basis of a novel and unsupported theory of sovereign immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that I have on this 11th day of February 2005, had copies of the foregoing **OPPOSITION TO MOTION TO DISMISS PETITION** delivered to the following via electronic mail or U.S. First Class mail, as indicated:

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